Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554



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| In the Matter of | ) | |
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| Access Charge Reform | ) | CC Docket No. 96-262 |

## OPPOSITION OF LBC COMMUNICATIONS, INC. TO PETITION FOR STAY PENDING JUDICIAL REVIEW

LBC Communications, Inc. ("LBC"), hereby opposes the petition of NYNEX, filed July 23, 1997 (the "Petition"), for stay of the Access Charge Reform Order.[1] In its Petition, NYNEX asks that the Commission stay the Access Charge Reform Order insofar as it prohibits incumbent local exchange carriers ("ILECs") from assessing the per-minute residual transport interconnection charge ("Residual TIC") on switched interconnection services used by competitive access providers ("CAPs") that do not use the ILEC's local transport services. For the reasons set forth below, LBC opposes NYNEX's Petition.

### DISCUSSION

Notwithstanding NYNEX's effort to dilute the four-factor test from Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958),[2] the Commission and the courts consistently have required parties seeking a stay to demonstrate that all four factors are satisfied.[3] Under the four-factor test, proponents of a stay must demonstrate (1) that they are likely to prevail on the merits, (2) that they will suffer irreparable harm if a stay is not granted, (3) that other interested parties will not be harmed if a stay is granted, and (4) that the public interest favors the grant of a stay.[4]

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1 In the Matter of Access Charge Reform, CC Docket No. 96-262 (rel. May 16, 1997).
2 See Petition at 9.
3 E.g., Iowa Utility Bd. v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (order granting stay) slip op. at 12-13; In re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 11754 (1996).
4 See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

## I. NYNEX Is Unlikely To Succeed On The Merits.

NYNEX's case on the merits is weak, at best. NYNEX argues that the Commission's rule prohibiting ILECs from assessing Residual TIC charges on CAP transport interconnection is internally "inconsistent" and that it will disproportionately affect NYNEX.[5] In addition, NYNEX argues that the rule was adopted without adequate notice to the parties. Neither contention has merit.

First, there is nothing "inconsistent" in the Commission's decision regarding the reallocation of TIC charges and the prohibition on assessing CAPs for the Residual TIC. In the Access Charge Reform order, the Commission found that

> the TIC, as currently structured, provides incumbent LECs with a competitive advantage for some of their interstate switched access services because the charges for those services do not recover their full costs. At the same time, the incumbent LECs' competitors using expanded interconnection must pay a share of incumbent LEC transport costs through the TIC.[6]

To address this competitive imbalance, the Commission ordered the reallocation of TIC costs, to the extent possible, and imposed the prohibition on the application of the Residual TIC that NYNEX now seeks to have stayed. Thus, the Commission's proposed remedy is perfectly in harmony with the market distortions that it found to be caused by current TIC charges.

Second, the rule suffers no procedural infirmity. In order to comport with the Administrative Procedure Act, agencies must include in each notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[7] In this case, and contrary to NYNEX's implication, it was clear from the Access Charge Reform NPRM that the Commission was contemplating the elimination of, or a substantially restructuring of, the entire access charge regime. It is simply untenable for NYNEX to claim now that it believed revisions to the TIC to be somehow exempt from this restructuring.

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[5] Petition at 10-18

[6] Access Charge Reform Order ¶ 212.

[7] 5 U.S.C. § 553(b)(3) (emphasis added); see also, e.g., Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (a final rule need not be identical to a proposed rule, so long as it is a "logical outgrowth" of the proposed rule).

## II. NYNEX Will Suffer No Irreparable Injury Absent A Stay.

A "concrete showing of irreparable harm is an essential factor in any request for a stay."[8] In this case, NYNEX has failed to make such a showing. NYNEX alleges that it will suffer irreparable harm in the absence of a stay because application of the rule will have a "devastating impact on NYNEX's revenues."[9] However, as the courts and the Commission have made abundantly clear, the loss of revenue alone does not constitute "irreparable harm" for purposes of the Virginia Petroleum Jobbers test.[10] "Also, because competitive harm is merely a type of economic loss, 'revenues and customers lost to competition which can be regained through competition are not irreparable.'"[11]

In any event, although application of the rule will result in increased competition for access services and possibly cost NYNEX some customers, the claim that application of the rule will deny NYNEX a "reasonable opportunity to compete" in this market is greatly overstated. For a variety of reasons (*e.g.*, there are no competitive access providers in some regions) NYNEX will continue to provide a wide array of access services whether or not it is prohibited from assessing Residual TIC charges on CAPs.

## III. Competitive Access Providers will Suffer Substantial Harm If A Stay Is Granted.

NYNEX alleges that grant of a stay will cause no harm to other parties. This claim, however, is unsupported, irreconcilable with the facts, and fashioned to suit NYNEX's present purpose. In fact, the opposite is true. Several CAPs, including LBC, have built business plans based on the reformed access regime. These plans include competitive entry into markets in which there currently are no competitive access providers. Such entry is premised, however, on economics that include the exemption from the Residual TIC that NYNEX now seeks to have stayed. Thus, if the Commission were to grant NYNEX's Petition and allow NYNEX to subsidize its switched access services by assessing a Residual TIC on CAP transport services, it

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[8] In re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd at 11755 (citations and quotations omitted).
[9] Petition at 19-23.
[10] See In re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd at 11756 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).
[11] See id. at 11756-57 (quoting Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 309 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985)).

will slow the development of competition and derail the efforts of new competitors to enter the market.

## IV. A Stay Would Not Serve The Public Interest.

Finally, NYNEX has failed entirely to advance even a single public interest reason for a stay. Instead, NYNEX simply reargues the merits of the Commission's decision, *i.e.*, that it will supposedly lead to distortions in the marketplace, have a "substantial impact" on ILEC transport revenues, and cause IXCs and CAPs to incur reconfiguration costs on the basis of a cost advantage that will be phased out over the next few years. None of these purported failings, however, goes to whether or not there is a public interest need for a stay of the rule pending review.

In fact, grant of NYNEX's stay request would be contrary to the public interest. If granted, a stay would shelter NYNEX and the other ILECs from a fully competitive access market while the ILECs tie the Commission up with, potentially, years of litigation. The consequent impediment to competition will hamstring the competitive access industry and, by extension, prevent the public in general from enjoying the fruits of competition.

## CONCLUSION

For all of the foregoing reasons, NYNEX has failed to satisfy even one, much less all four, of the factors from Virginia Petroleum Jobbers Ass'n v. FPC, and its petition for stay pending appeal should be denied.

Respectfully submitted,

LBC COMMUNICATIONS, INC.

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August 8, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of LBC Communications, Inc. to Petition for Stay Pending Judicial Review was sent by first-class mail, postage prepaid, this 8th day of August, 1997, to each of the following:

Joseph Di Bella
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Hema Patel

* By Hand